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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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09/772,189

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EXAMINER

PASCUA, JES F

ART UNIT

PAPER NUMBER

3782

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DELIVERY MODE

01/30/2009

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 09/772,189	<b>Applicant(s)</b> STURGIS ET AL.	
	<b>Examiner</b> Jes F. Pascua	<b>Art Unit</b> 3782	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 25 August 2008.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 26-29 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 26-29 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)          | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

## **DETAILED ACTION**

### ***Continued Examination Under 37 CFR 1.114***

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 08/25/2008 has been entered.

### ***Claim Rejections - 35 USC § 103***

2. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

3. Claims 26 and 28 are rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent No. 5,782,562 to Anspacher and U.S. Patent No. 4,971,453 to Rantanen.

Anspacher shows a bag comprising first and second sidewalls, a centerline between the top and bottom of the bag, a pouring region formed on a first side (i.e., above) of the centerline (Fig. 6), the first and second sidewalls defining a first aperture (88 or 90), the first aperture having an oblong shape comprising a major axis parallel to the centerline of the first and second sidewalls, the first aperture disposed adjacent to a

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corner of the first and second side walls and on the opposite side of (i.e., below) the centerline from the pouring region. The first and second sidewalls are coupled to one another in a heat-sealed region (80) surrounding the first aperture. However, Anspacher does not show a rectangular reinforcing strip coupled to an outside surface of at least one of the first and second sidewalls, the reinforcing strip having a vertical length less than the first and second sidewalls, the reinforcing structure having a horizontal length less than the first and second sidewalls, the rectangular reinforcing strip defining a second aperture aligned with the first aperture of the first and second sidewalls, the rectangular reinforcing strip comprising four strip edges, wherein at least two of the four strip edges of the rectangular reinforcing strip are both parallel and aligned with edges of the first and second sidewalls. Rantanen discloses that it is known in the art to provide a reinforcing strip having a vertical length less than the first and second sidewalls, the reinforcing structure having a horizontal length less than the first and second sidewalls, the rectangular reinforcing strip defining a second aperture aligned with the first aperture of the first and second sidewalls, the rectangular reinforcing strip comprising four strip edges, wherein at least two of the four strip edges of the rectangular reinforcing strip are both parallel and aligned with edges of the first and second sidewalls. It would have been obvious to one having ordinary skill in the art at the time the invention was made to provide the first aperture of Anspacher with the reinforcing strip of Rantanen, in order to strengthen the aperture and prevent tearing.

As a note, applicant's nomenclature for the "centerline" does not define over the Anspacher bag, which meets applicant's claimed relationship and association between the "pouring region" and the "first aperture" with respect to a "centerline".

Regarding claim 28, Anspacher and Rantanen disclose the claimed invention, as discussed above, except for the first and second sidewalls comprising a material selected from the group consisting of polyethylene of polystyrene. It would have been obvious to one having ordinary skill in the art at the time the invention was made to use polyethylene of polystyrene for the first and second sidewalls of the modified Anspacher bag, since it has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use as a matter of obvious design choice.

4. Claim 29 is rejected under 35 U.S.C. 103(a) as being unpatentable over Anspacher and Rantanen, as applied to claim 26 above, and further in view of Japanese Patent No. 3-226460 to Toshiji Shimamoto.

Anspacher and Rantanen disclose the claimed device, as discussed above, except for the first aperture having a ring positioned therein. Toshiji Shimamoto discloses that it is known in the art to provide a ring within the aperture of an analogous bag. It would have been obvious to one having ordinary skill in the art at the time the invention was made to provide the first aperture of the modified Anspacher bag with the ring of Toshiji Shimamoto, in order to reinforce the first aperture.

5. Claims 26-28 are rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent No. 5,882,120 to Bell and Rantanen.

Bell shows a bag comprising first and second sidewalls, a centerline between the top and bottom of the bag, a pouring region formed on a first side (i.e., below) of the centerline, the first and second sidewalls defining a first aperture, the first aperture having an oblong shape comprising a major axis parallel to the centerline of the first and second sidewalls, the first aperture disposed adjacent to a corner of the first and second side walls and on the opposite side of (i.e., above) the centerline from the pouring region. The first and second sidewalls are coupled to one another in a heat-sealed region surrounding the first aperture. However, Bell does not show a rectangular reinforcing strip coupled to an outside surface of at least one of the first and second sidewalls, the reinforcing strip having a vertical length less than the first and second sidewalls, the reinforcing structure having a horizontal length less than the first and second sidewalls, the rectangular reinforcing strip defining a second aperture aligned with the first aperture of the first and second sidewalls, the rectangular reinforcing strip comprising four strip edges, wherein at least two of the four strip edges of the rectangular reinforcing strip are both parallel and aligned with edges of the first and second sidewalls. Rantanen discloses that it is known in the art to provide a reinforcing strip having a vertical length less than the first and second sidewalls, the reinforcing structure having a horizontal length less than the first and second sidewalls, the rectangular reinforcing strip defining a second aperture aligned with the first aperture of the first and second sidewalls, the rectangular reinforcing strip comprising four strip

edges, wherein at least two of the four strip edges of the rectangular reinforcing strip are both parallel and aligned with edges of the first and second sidewalls. It would have been obvious to one having ordinary skill in the art at the time the invention was made to provide the first aperture of Bell with the reinforcing strip of Rantanen, in order to strengthen the aperture and prevent tearing.

As a note, applicant's nomenclature for the "centerline" does not define over the Bell bag, which meets applicant's claimed relationship and association between the "pouring region" and the "first aperture" with respect to a "centerline".

Regarding claim 28, Anspacher and Rantanen disclose the claimed invention, as discussed above, except for the first and second sidewalls comprising a material selected from the group consisting of polyethylene of polystyrene. It would have been obvious to one having ordinary skill in the art at the time the invention was made to use polyethylene of polystyrene for the first and second sidewalls of the modified Anspacher bag, since it has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use as a matter of obvious design choice.

6. Claim 29 is rejected under 35 U.S.C. 103(a) as being unpatentable over Bell and Rantanen, as applied to claim 26 above, and further in view of Japanese Patent No. 3-226460 to Toshiji Shimamoto.

Bell and Rantanen disclose the claimed device, as discussed above, except for the first aperture having a ring positioned therein. Toshiji Shimamoto discloses that it is

known in the art to provide a ring within the aperture of an analogous bag. It would have been obvious to one having ordinary skill in the art at the time the invention was made to provide the first aperture of the modified Bell bag with the ring of Toshiji Shimamoto, in order to reinforce the first aperture

7. Claims 26-28 are rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent No. 5,593,229 to Warr, Anspacher and Rantanen.

Warr discloses the claimed device except for the first and second sidewalls defining a first aperture the first aperture having an oblong shape comprising a major axis parallel to the centerline of the first and second sidewalls, the first aperture disposed adjacent to a corner of the first and second side walls and on the opposite side of the centerline from the pouring region with the first and second sidewall being coupled to one another in a heat-sealed region surrounding the first aperture.

Anspacher discloses that it is known in the art to define a first aperture in the first and second sidewalls of an analogous bag. Anspacher further discloses the first aperture having an oblong shape comprising a major axis parallel to the centerline of the first and second sidewalls with the first aperture disposed adjacent to a corner of the first and second side walls and on the opposite side of (i.e., below) the centerline from the pouring region. Anspacher also discloses the first and second sidewalls are coupled to one another in a heat-sealed region surrounding the first aperture. It would have been obvious to one having ordinary skill in the art at the time the invention was made to



provide the first and second sidewalls of Warr with the first aperture of Anspacher, in order to facilitate manipulating and carrying the bag.

Furthermore, Warr and Anspacher disclose the claimed invention except for a rectangular reinforcing strip coupled to an outside surface of at least one of the first and second sidewalls, the reinforcing strip having a vertical length less than the first and second sidewalls, the reinforcing structure having a horizontal length less than the first and second sidewalls, the rectangular reinforcing strip defining a second aperture aligned with the first aperture of the first and second sidewalls, the rectangular reinforcing strip comprising four strip edges, wherein at least two of the four strip edges of the rectangular reinforcing strip are both parallel and aligned with edges of the first and second sidewalls. Rantanen discloses that it is known in the art to provide a reinforcing strip having a vertical length less than the first and second sidewalls, the reinforcing structure having a horizontal length less than the first and second sidewalls, the rectangular reinforcing strip defining a second aperture aligned with the first aperture of the first and second sidewalls, the rectangular reinforcing strip comprising four strip edges, wherein at least two of the four strip edges of the rectangular reinforcing strip are both parallel and aligned with edges of the first and second sidewalls. It would have been obvious to one having ordinary skill in the art at the time the invention was made to provide the aperture of the modified Warr bag with the reinforcing strip of Rantanen, in order to strengthen the handle and prevent tearing.

### ***Response to Arguments***

8. Applicant's arguments with respect to claims 26-29 have been considered but are moot in view of the new grounds of rejection.

9. The declaration under 37 CFR 1.132 filed 12/20/2006 is insufficient to overcome the various rejections of claims 26-29 under 35 U.S.C. 103(a) as being unpatentable over Anspacher, Rantanen, Bell, Toshiji Shimamoto and Warr in the present Office action because: the declaration only shows a table indicating gross sales of applicant's claimed product. The declaration fails to provide evidence in the form of a table indicating gross sales of the wild bird food and grass seed markets to support the statement "Over the same time period, the wild bird food and grass seed markets grew at a rate not significantly greater than inflation." Applicant's representative's "logical conclusions", besides being opinion, are based solely on the gross sales reported in the declaration and a general statement regarding the growth of the wild bird food and grass seed market. The Examiner reiterates that gross sales figures do not show commercial success absent evidence as to market share, *Cable Electric Products, Inc. v. Genmark, Inc.*, 770 F.2d 1015, 226 USPQ 881 (Fed. Cir. 1985), or as to what sales would normally be expected in the market, *Ex parte Standish*, 10 USPQ2d 1454 (Bd. Pat. App. & Inter. 1988). The declaration fails to clearly establish applicant's market share prior to and during sales of bags utilizing the claimed feature. The declaration further fails to indicate the sales normally expected in the market. The declaration is unclear as to what percentage of the reported gross sales are due to distribution to retailers or direct consumer sales.

Regarding paragraph 7 of the declaration, there is no clear indication of the amount of advertising done to promote the products sold by Performance Seed prior to 2002 or the kind of advertising done from 2002 to 2005 to set forth the metes and bounds of the phrase "No substantial advertising was done".

Applicant's opinion as to the purchaser's reason for buying the product based upon the market research studies is insufficient to demonstrate a nexus between the sales and the claimed invention. Merely showing that there was commercial success of an article which embodied the invention is not sufficient.

In view of the foregoing, when all of the evidence is considered, the totality of the rebuttal evidence of nonobviousness fails to outweigh the evidence of obviousness. Although the record may establish evidence of secondary considerations which are indicia of nonobviousness, the record may also establish such a strong case of obviousness that the objective evidence of nonobviousness is not sufficient to outweigh the evidence of obviousness. *Newell Cos. v. Kenney Mfg. Co.*, 864 F.2d 757, 769, 9 USPQ2d 1417, 1427 (Fed. Cir. 1988), cert. denied, 493 U.S. 814 (1989); *Richardson-Vicks, Inc., v. The Upjohn Co.*, 122 F.3d 1476, 1484, 44 USPQ2d 1181, 1187 (Fed. Cir. 1997) (showing of unexpected results and commercial success of claimed ibuprofen and pseudoephedrine combination in single tablet form, while supported by substantial evidence, held not to overcome strong prima facie case of obviousness).

### ***Conclusion***

10. Applicant is duly reminded that a complete response must satisfy the requirements of 37 C.F. R. 1.111, including: "The reply must present arguments pointing out the specific distinctions believed to render the claims, including any newly presented claims, patentable over any applied references. A general allegation that the claims "define a patentable invention" without specifically pointing out how the language of the claims patentably distinguishes them from the references does not comply with the requirements of this section. Moreover, "The prompt development of a clear Issue requires that the replies of the applicant meet the objections to and rejections of the claims." Applicant should also specifically point out the support for any amendments made to the disclosure. See MPEP 2163.06 II(A), MPEP 2163.06 and MPEP 714.02. The "disclosure" includes the claims, the specification and the drawings.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jes F. Pascua whose telephone number is 571-272-4546. The examiner can normally be reached on Mon.-Thurs..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Nathan J. Newhouse can be reached on 571-272-4544. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for

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published applications may be obtained from either Private PAIR or Public PAIR.

Status information for unpublished applications is available through Private PAIR only.

For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Jes F. Pascua/  
Primary Examiner, Art Unit 3782